# STATE OF MICHIGAN

# COURT OF APPEALS

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ANDRIS PUKKE,

Plaintiff-Appellant/Cross-Appellee,

and

SEASPRAY HOLDING, LTD, and MICHAEL BUCHARD,

Plaintiffs-Appellants,

v

HYMAN LIPPITT, P.C.,

Defendant-Appellee/Cross-Appellant,

and

TERRY GIVENS,

Defendant-Appellee,

and

JOHN DOES #1 THROUGH #50,

Defendants.

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UNPUBLISHED
June 6, 2006

No. 265477
Oakland Circuit Court
LC No. 05-064013-NM

Before: Murphy, P.J., and O'Connell and Murray, JJ.

PER CURIAM.

Plaintiffs appeal as of right from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(7) and (8).[1] We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

## I. Background

### A. Factual Background

This case arises out of the formation and registration of an "offshore" investment fund, Agave Ltd ("Agave"), and the sale of its securities to plaintiffs. The following background is taken from plaintiffs' complaint.[2]

Hyman Lippitt, P.C., is a law firm in Birmingham, Michigan, representing that it was experienced in business planning and securities law and had expertise in offshore tax planning and asset protection. Keith Mohn, an investment advisor and client of Hyman Lippitt, referred several of his clients to Hyman Lippitt's Offshore Practice Group, which was headed by Terry Givens, Esq. One such client who was referred to Hyman Lippitt for investment purposes was J. Patrick Kisor.

In April 2000, Givens met with Mohn, Kisor and Kisor's associate, Dennis Drabeck. During the meeting, Givens informed Mohn and Kisor that Hyman Lippitt could create an investment vehicle for clients of Hyman Lippitt's Offshore Practice Group for a fee of $125,000. Kisor paid the fee and became a client of Hyman Lippitt.

Thereafter, Givens formed GNT as a Cook Islands trust company. GNT was used to create Agave, which operated under the laws of the Cook Islands. Givens established the structure of Agave with three classes of shareholders, classes A, B and C. Pippa Kerry was the sole Class A Shareholder and Director. Class B shares were sold to those who invested up to

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[1] In its response brief on appeal, Hyman Lippitt raises a jurisdictional challenge. Hyman Lippitt contends that plaintiffs' appeal is untimely because plaintiffs failed to file their postjudgment motion within 14 days of the final order pursuant to MCR 2.119(F)(1). Although that court rule provides that a motion for reconsideration must be filed within 14 days of the entry of the order being challenged, the appellate court rules allow a party to appeal so long as the motion was filed within 21 days of the order being appealed. MCR 7.204(A)(1)(b). Here, the trial court entered an order granting summary disposition in favor of defendants on August 9, 2005, and plaintiffs filed a motion for relief from judgment on August 29, 2005. Because plaintiffs filed their postjudgment motion within the requisite 21 days, Hyman Lippitt's jurisdictional challenge lacks merit.

[2] In a motion for summary disposition under MCR 2.116(C)(8), this Court must accept all factual allegations in the complaint as true. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999); *Alan Custom Homes, Inc v Krol*, 256 Mich App 505, 508; 667 NW2d 379 (2003). Moreover, the contents of the complaints are accepted as true unless contradicted by documentation submitted by the moving party in a motion for summary disposition under MCR 2.116(C)(7). *Maiden*, *supra* at 119; *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994).

$500,000, and Class C shares were sold to those who invested $500,000 and above. Either Givens or other attorneys from Hyman Lippitt prepared the documents that investors used to purchase Class B and C shares of Agave.

The investors were provided with little information about the investment opportunity. The investors were given "generic information" about the "risk neutral" options strategy used by Kisor, which they were told was yielding earnings "in excess of 2% per month." The investors were not told of the risks involved in investment in a company organized under the laws of the Cook Islands nor were they told of the risks of investing in unregistered securities where an exemption may not be available. Moreover, the investors were not provided with any information on Kisor's background and experience. Nor were they informed that Kisor managed Agave's funds at EDF Mann by a general rather than a limited Power of Attorney, which allowed him to embezzle funds and invest funds in unauthorized investments.

In October 2000, investments in Agave began and continued through May 2002, by which time the total investment amount reached approximately $31 million. Plaintiff Pukke was referred to Hyman Lippitt by Mohn in 1999. In the course of its representation of Pukke, Hyman Lippitt formed plaintiff Seaspray Holding, Ltd. ("Seaspray"), which operated under the laws of the West Indies. Before investing in Agave, plaintiff Michael Buchard and other representatives of Seaspray met with Mohn and Givens, and were assured by Givens that Hyman Lippitt represented Kisor, it had done "due diligence" on Kisor, Kisor's operation was legitimate and the returns on the investments were as represented. In reliance on these representations and Hyman Lippitt's competence, Seaspray and Buchard invested in Agave.

In early 2001, Givens transferred the preparation and mailing of monthly account statements from GNT to Hanver, Ltd., a West Indies company. The monthly statements contained data regarding Agave's positions and values transmitted electronically from Kisor. However, the data that Kisor supplied was incorrect and was used to conceal his misappropriation of Agave's funds and unauthorized investments.

In June 2001, at Given's direction and through Hyman Lippitt's legal work, Agave acquired a seat on the Chicago Board of Options Exchange ("CBOE") in the name of Agave employee, Gil Howard. Agave paid Howard a bonus adequate enough to pay necessary income taxes and still purchase the seat.

Also in the summer of 2001, Hanver told Givens and Mohn that it suspected that Kisor was providing inaccurate account data. On February 9, 2002, after being asked to provide financial statements for the previous year, Kisor confessed his misconduct to Mohn, who informed Givens. On February 10, 2002, Givens told EDF Mann that Kisor's Power of Attorney had been terminated and instructed it to transmit all the money in the account to Agave, care of GNT. Givens and Mohn discovered that of the approximately $31 million invested, only about $10 million in cash remained. Kisor had embezzled at least $5 million and had placed the remaining $15 million into investments inconsistent with the strategy that Kisor had presented to investors.

In March 2002, Givens established Genesis L.L.C. ("Genesis"), a Michigan limited liability company, and placed Mohn as the manager. Givens directed Hanver and GNT to issue Genesis shares to Agave's U.S. investors. Givens also had the approximately $10 million in

Agave's account transferred to a newly created Genesis account Givens advised Hanver that it should not disclose Kisor's improper conduct to the investors, that the investment values reported to Hanver were correct and that Hanver should continue to disburse statements reflecting those values to the investors. In June 2002, Givens left Hyman Lippitt and moved to Chicago to manage both Agave and Genesis.

The SEC began investigating Kisor's activities. In August 2002, Mohn was subpoenaed in connection with the investigation. Givens advised Mohn that he did not need representation and was not required to answer any questions. Mohn met with SEC attorneys without counsel and answered their questions. On November 22, 2002, the SEC commenced *Securities and Exchange Commission v Mohn* (Case No. 02-74634) (the "SEC Action"), in the Eastern District of Michigan against Kisor, Mohn, Agave and others, alleging that the issuance of Agave shares violated the registration and antifraud provisions of the federal securities laws. The SEC seized the assets of Agave and Genesis. Hyman Lippitt agreed to represent Mohn in the SEC action, but never told Mohn or anyone else that it had created and previously represented Agave and Genesis.

Plaintiffs asserted that, Givens and Hyman Lippitt concealed their roles in the investment scheme. Givens advised Hanver that Kisor's misappropriation and mishandling of the investments should not be disclosed to the investors since it might cause a "run on the bank." Throughout its representation of Mohn, Hyman Lippitt concealed its role by failing to advise Mohn to assert the "advice of counsel" defense, and by rejecting two receivers that the SEC proposed, and recommending Bradley Schram be appointed as receiver because he had an established personal and business relationship with Hyman Lippitt and the law firm believed that he would not investigate or pursue claims against it. Plaintiffs also asserted that Hyman Lippitt was aware that Kisor's misappropriation of funds was allowed to occur because it prepared and authorized the use of a general Power of Attorney for Kisor, the scope of which was contrary to the customs and standards of the financial industry. Plaintiffs further asserted that Hyman Lippitt was aware that the issuance of Agave shares did not comply with federal and state securities laws.

B. Procedural Background

On February 1, 2005, plaintiffs filed their initial complaint, and on February 3, 2005, plaintiffs filed an amended complaint against defendants, alleging five counts: (1) control person liability under MCL 451.810(b) because of the unregistered sale of securities in violation of MCL 451.810(a)(1); (2) control person liability under MCL 451.810(b) because of the sale of securities by misrepresentation and/or omission in violation of MCL 451.810(a)(2); (3) legal malpractice; (4) fraud; and (5) breach of fiduciary duty.

On April 15, 2005, defendants Hyman Lippitt and John Does #1 through #20 (collectively, "Hyman Lippitt"), later joined by Givens, filed a motion for summary disposition under MCR 2.116(C)(7) and (8). Hyman Lippitt contended that plaintiffs were precluded from asserting claims against it under the Michigan Uniform Securities Act ("MUSA"), MCL 451.501 *et seq.*, because they failed to bring a cause of action against the seller of the securities, and Hyman Lippitt was not a member of a class that could be sued under the MUSA since it could not be held liable under a common law theory of liability. Hyman Lippitt further contended that plaintiffs' claim of unregistered sale of securities was barred by the two-year statute of repose and that Michigan's fraudulent concealment statute did not toll application of the statute of repose. Similarly, Hyman Lippitt asserted that plaintiffs' claim of material misrepresentations and omissions in the sale of securities was also time-barred under the MUSA because some sales occurred more than four years before plaintiffs filed the instant action and the remaining sales occurred more than two years after plaintiffs knew or should have known of the alleged misconduct. Hyman Lippitt claimed that the press release of the SEC complaint in November 2002 placed plaintiffs on notice of a possible cause of action against defendants, and the subscription agreement placed plaintiffs on notice of the risks involved in the investments.

Hyman Lippitt also argued that plaintiffs' legal malpractice claim must be dismissed because plaintiff Buchard did not assert an attorney-client relationship, Givens ceased representation more than two years before the claim was filed, and plaintiffs were aware of a possible cause of action in November 2002. Hyman Lippitt further argued that plaintiffs' fraud and breach of fiduciary duty claims were merely duplicative of the legal malpractice claim. Finally, Hyman Lippitt contended that plaintiffs' theory of fraudulent concealment lacked merit because there was no showing of affirmative acts of concealment, and the statute of limitations would not toll where a plaintiff could have discovered the alleged fraud from public records.

On May 17, 2005, plaintiffs filed a response to defendants' motion for summary disposition, contending that (1) they were entitled to assert claims against Hyman Lippitt and Givens under the MUSA without obtaining a judgment or contemporaneously filing a claim against the actual seller; (2) Hyman Lippitt and Givens were both liable under the MUSA as control persons; (3) the saving provision of the fraudulent concealment statute may be applied to toll the limitations periods in the MUSA; (4) the SEC action did not place them on inquiry notice of Hyman Lippitt's involvement; and (5) the same set of facts can support more than one cause of action, and they adequately alleged facts sufficient to support their additional claims of fraud and breach of fiduciary duty.

At the beginning of the hearing on defendants' motion for summary disposition, the trial court denied plaintiffs' motion to disqualify.[3] The parties then reiterated their arguments regarding defendants' motion. On August 9, 2005, the trial court entered a written opinion and order. The trial court rejected defendants' assertions that the seller must be joined as a party in order for plaintiffs to prevail against defendants under the MUSA, and that Hyman Lippitt did not fall within a class that could be sued under the MUSA. Nevertheless, the trial court granted defendants' motion for summary disposition.

Specifically, the trial court dismissed counts I and II of plaintiffs' complaint alleging violations of securities laws because the statue of limitations had expired and there was

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[3] Apparently, at a hearing on June 15, 2005, the trial court mentioned that J. Leonard Hyman of Hyman Lippitt had represented her father's business and inquired regarding the extent of Hyman's participation in this matter. Subsequently, both parties filed briefs regarding this issue and its relevance to judicial disqualification. Hyman Lippitt submitted Hyman's Affidavit, in which he averred that he was not personally involved nor connected in any way with this matter or any related matter. Thereafter, plaintiffs filed a motion to disqualify the trial judge.

insufficient evidence of fraudulent concealment. The trial court further held that count III of plaintiffs' complaint regarding legal malpractice was barred by the statute of limitations because the complaint was filed more than two years after Givens stopped providing legal services to plaintiffs and more than six months after plaintiffs knew or should have known that they had a cause of action against defendants. The trial court noted that plaintiffs were on notice of the potential claims in this matter as of November 2002 when the SEC filed its complaint. Finally, the trial court granted defendants' motion regarding the claims of fraud and breach of fiduciary duty, concluding that these claims were "mere restatements of the legal malpractice claim."

Plaintiffs filed postjudgment motions for settlement of the order documenting the trial court's denial of their motion to disqualify, for referral of their motion for disqualification to the Chief Judge of the Oakland Circuit Court, and for relief from judgment. The trial judge entered a written order denying plaintiffs' motion for judicial disqualification based on the reasons stated on the record. The trial judge also denied plaintiffs' motion for relief from judgment as untimely filed and failing to show a palpable error whereby the court and the parties were misled. After hearing oral arguments on plaintiffs' motion to disqualify, Oakland County Circuit Court Chief Judge Wendy Potts entered an order denying the motion, finding that plaintiffs failed to overcome the presumption of judicial impartiality.

## II. Analysis

### A. Statute of Limitation/Statute of Repose

Plaintiffs' primary contention is that the trial court erred in concluding that their MUSA claims were time-barred. A trial court's grant or denial of summary disposition under MCR 2.116(C)(7) and (8) is a question of law that we review de novo. *Hazle v Ford Motor Co*, 464 Mich 456, 461; 628 NW2d 515 (2001). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a complaint and "[a]ll well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). The legal sufficiency of the complaint is determined by the pleadings alone. *Beaudrie v Henderson*, 465 Mich 124, 129; 631 NW2d 308 (2001). A motion under this subrule is appropriate only where "no factual development could possibly justify recovery." *Wade v Dep't of Corrections*, 439 Mich 158, 163; 483 NW2d 26 (1992).

"A party may support a motion under MCR 2.116(C)(7) by affidavits, depositions, admissions, or other documentary evidence." *Maiden*, *supra* at 119. However, the contents of the complaint are accepted as true unless contradicted by documentation submitted by the moving party. *Id.*; *Patterson v Kleiman*, 447 Mich 429, 434 n 6; 526 NW2d 879 (1994). Judgment under MCR 2.116(C)(7) is appropriate "[i]f the pleadings demonstrate that a party is entitled to judgment as a matter of law, or if affidavits or other documentary evidence show that there is no genuine issue of material fact." *Harris v Allen Park*, 193 Mich App 103, 106; 483 NW2d 434 (1992). Absent a contested issue of fact, this Court decides whether a cause of action is barred by a statute of limitations de novo, as a question of law. *City of Novi v Woodson*, 251 Mich App 614, 621; 651 NW2d 448 (2002). In addition, the interpretation of a statute is a question of law that we review de novo.

"A statute of repose prevents a cause of action from ever accruing when the injury is sustained after the designated statutory period has elapsed. A statute of limitation, however, prescribes the time limits in which a party may bring an action that has already accrued." *Sills v Oakland General Hosp*, 220 Mich App 303, 308; 559 NW2d 348 (1996) (internal citation omitted). Courts have concluded that a single enactment can contain both a statute of limitation and a statute of repose. See *O'Brien v Hazelet & Erdal*, 410 Mich 1, 15; 299 NW2d 336 (1980); *Sills*, *supra* at 308. For instance, in *Sills*, *supra* at 307-308, the applicable statute for the plaintiff's medical malpractice action provided:

> Except as otherwise provided in this subsection, an action involving a claim based on medical malpractice may be commenced at any time within the applicable period prescribed in section 5805 or sections 5851 to 5856, or within 6 months after the plaintiff discovers or should have discovered the existence of the claim, whichever is later. However, . . . the claim shall not be commenced later than 6 years after the date of the act or omission that is the basis for the claim. . . . A medical malpractice action that is not commenced within the time prescribed by this subsection is barred. [MCL 600.5838a(2).]

The *Sills* Court held that the statute was both a statute of limitation and a statute of repose since "it prescribes the time limit in which a plaintiff who is injured within the statutory period must bring suit and also prevents a plaintiff from bringing suit if she sustained an injury outside the statutory period." *Id*. at 308.

i. MCL 451.810(a)(1)

The first count of plaintiffs' complaint alleges that defendants failed to register securities in contravention of section 301 of the MUSA, MCL 451.701, which provides:

> It is unlawful for any person to offer or sell any security in this state unless 1 of the following is met:
>
> (1) It is registered under this act.
>
> (2) The security or transaction is exempted under section 402.
>
> (3) The security is a federally covered security.

The statute provides, "A person may not bring an action under subsection (a)(1) more than 2 years after the contract of sale." MCL 451.810(e).

Plaintiffs filed their initial complaint on February 1, 2005. Plaintiffs invested in Agave over two years before they filed their complaint. Nevertheless, plaintiffs argued that this claim was tolled by Michigan's fraudulent concealment statute, MCL 600.5855.[4]

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[4] MCL 600.5855 provides: "If a person who is or may be liable for any claim fraudulently conceals the existence of the claim or the identity of any person who is liable for the claim from the knowledge of the person entitled to sue on the claim, the action may be commenced at any

(continued…)

An Official Comment to a subsequent version of the federal Uniform Securities Act provides:

> The 1956 Act section 410(p) provided that: "No person may sue under this section more than two years after the contract of sale." Under this provision, the state courts generally decline to extend a statute of limitations period on grounds of fraudulent concealment or equitable tolling . . . [Section 410(p) of] the 1956 Act, is a unitary statute of repose . . . . It is not intended that equitable tolling be permitted. [Uniform Laws Annotated, Uniform Securities Act of 2002, § 509, Official Comment #14.]

In three federal cases arising out of the same securities transactions and concerning nearly identical factual and legal allegations, the plaintiffs brought claims against Hyman Lippitt, Givens and others, in part, under the MUSA based on the alleged unregistered sales of securities and the material misrepresentations and omissions in the sale of securities. *Adams v Hyman Lippitt P.C.*, ___ F Supp 2d ___ (ED Mich, 2005); 2005 WL 3556196, 16; see also *Burket v Hyman Lippitt, P.C.*, ___ F Supp 2d ___ (ED Mich, 2005); 2005 WL 3556202, and *Cliff v Hyman Lippitt, P.C.*, ___ F Supp 2d ___ (ED Mich, 2005); 2005 WL 3556201.[5] With regard to the application of this Official Comment to the MUSA claims, the federal district court noted that, "[a]lthough this Official Comment was included in a later version of the Uniform Securities Act, it specifically addresses the 1956 version of the Uniform Securities Act, which was the version adopted in Michigan." *Adams*, *supra* at 17. The language of section 410(p) is nearly identical to the limiting language in MCL 451.810(e) as it relates to actions under subsection (a)(1). Thus, the federal district court applied this comment to the MUSA claims, concluding that most were barred by the statute of repose. *Id*.[6] Likewise, this comment is applicable to plaintiffs' MUSA claims and leads us to conclude that MCL 451.810(e) contains a period of repose with regard to the claim under subsection (a)(1).

This Court has held that the fraudulent concealment statute will not operate to toll a statute of repose. *Baks v Moroun*, 227 Mich App 472, 486; 576 NW2d 413 (1998), overruled in part on other grounds *Estes v Idea Engineering & Fabricating, Inc*, 250 Mich App 270; 649 NW2d 84 (2002). Accordingly, the trial court properly determined that plaintiffs' claim under MCL 451.810(a)(1) was barred by the two-year statute of repose.

ii. MCL 451.810(a)(2)

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(…continued)

time within 2 years after the person who is entitled to bring the action discovers, or should have discovered, the existence of the claim or the identity of the person who is liable for the claim, although the action would otherwise be barred by the period of limitations."

[5] These three cases were again before the federal district court on defendants' motion for clarification or reconsideration; however, the subsequent holdings do not affect the rulings on which we rely. See *Adams v Hyman Lippitt, P.C.*, __ F Supp 2d ___ (ED Mich, 2006); 2006 WL 901703; *Burket v Hyman Lippitt, P.C.*, ___ F Supp 2d ___ (ED Mich, 2006); 2006 WL 901696; *Cliff v Hyman Lippitt, P.C.*, ___ F Supp 2d ___ (ED Mich, 2006); 2006 WL 901665.

[6] Although nonbinding on this Court, decisions from other jurisdictions can be persuasive. *Abela v General Motors Corp*, 469 Mich 603, 607; 677 NW2d 325 (2004).

The second count of plaintiffs' complaint alleges that defendants sold securities by means of misrepresentation and omission in contravention of section 410 of the MUSA, MCL 451.810(a)(2). This statute provides:

> (a) Any person who does either of the following is liable to the person buying the security from him or her . . .
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> ***
>
> (2) Offers or sells a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, and who does not sustain the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the untruth or omission. [MCL 451.810(a)(2).]

The statute also states, "A person may not bring an action under subsection (a)(2) more than 2 years after the person, in the exercise of reasonable care, knew or should have known of the untruth or omission, but in no event more than 4 years after the contract of sale." MCL 451.810(e). Plaintiffs again argued that this claim was tolled under Michigan's fraudulent concealment statute.

As in *Sills*, *supra*, the portion of MCL 451.810(e) pertaining to claims under subsection (a)(2) is both a statute of limitation and a statute of repose. The language precluding a party from bringing an action under subsection (a)(2) more than four years after the contract of sale is a statute of repose as it contains an express period for filing an action. See *Sills*, *supra* at 308. As we previously noted, the fraudulent concealment statute will not operate to toll a statute of repose. *Baks*, *supra* at 486. Thus, to the extent that plaintiffs' investments occurred more than four years before they filed their complaint, the trial court properly determined that the claim under MCL 451.810(a)(2) was time-barred.[7]

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[7] Apparently, this four-year period of repose only bars the first of plaintiff Seaspray's investments because the complaint was initially filed on February 1, 2005, and according to the complaint, plaintiff Seaspray made the following investments in Agave:

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|---|---|
| October 1, 2000 | $2,055,302 |
| February 2, 2001 | $199,181 |
| March 30, 2001 | $149,615 |
| April 1, 2001 | $87,000 |
| July 20, 2001 | $87,000 |

(continued…)

However, the language precluding a party from bringing a cause of action more than two-years after the party knew or should have known about the untruth or omission is a statute of limitation as it prescribes a time limit during which an action that has already accrued may be filed. See *Sills*, *supra* at 308. Pursuant to Michigan law, a statute of limitations may be tolled where a defendant has fraudulently concealed a cause of action, MCL 600.5855, such as where a defendant's conduct conceals the existence of a claim from a plaintiff. *Eschenbacher v Hier*, 363 Mich 676, 682; 110 NW2d 731 (1961).

Plaintiffs asserted that, because of defendants' actions of concealment, they did not discover the facts of defendants' involvement until December 2004 when they became aware of the general power of attorney prepared and given to Kisor, which allowed him the opportunity to embezzle and misallocate Agave funds. We disagree, and instead hold that the SEC's press release, coupled with plaintiffs' preexisting knowledge of defendants' relationship to Agave and Kisor, demonstrate that plaintiffs knew or should have known of a possible cause of action against defendants in November 2002.

Under Michigan law, "[f]or a plaintiff to be sufficiently apprised of a cause of action, a plaintiff need only be aware of a 'possible cause of action.'" *Doe v Roman Catholic Archbishop of the Archdiocese of Detroit*, 264 Mich App 632, 643; 692 NW2d 398 (2004), quoting *Moll v Abbott Laboratories*, 444 Mich 1, 23-24; 506 NW2d 816 (1993). "[T]he plaintiff need not be able to prove each element of the cause of action before the statute of limitations begins to run."

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(…continued)

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|---|---|
| August 2, 2001 | $435,000 |
| November 1, 2001 | $87,000 |
| November 30, 2001 | $217,000 |
| December 31, 2001 | $397,500 |
| March 30, 2002 | $130,500 |
| April 23, 2002 | $217,500 |

Plaintiff Buchard invested the following in Agave:

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|---|---|
| February 1, 2001 | $199,181 |
| March 30, 2001 | $189,450 |
| [April] 1, 2001 | $29,919 |
| June 27, 2001 | $75,722 |
| July 21, 2001 | $2,728 |
| October 8, 2001 | $148,837 |

*Solowy v Oakwood Hosp Corp,* 454 Mich 214, 224; 561 NW2d 843 (1997). "Once a plaintiff is aware of an injury and its possible cause, the plaintiff is equipped with the necessary knowledge to preserve and diligently pursue his claim." *Id*. at 223.

This "possible cause of action" standard coincides with the "inquiry notice" standard the Sixth Circuit utilizes for securities fraud actions, which requires plaintiffs "to begin investigating the possibility of fraud when they bec[o]me aware of suspicious facts, or 'storm warnings.'" *Greenburg v Hiner,* 359 F Supp 2d 675, 682 (ND Ohio, 2005), quoting *New England Health Care Employees Pension Fund v Ernst & Young, LLP*, 336 F3d 495, 501 (CA 6, 2003); see also *In re Livent, Inc, Securities Litigation*, 148 F Supp 2d 331, 364-365 (SD NY, 2001). "[I]nquiry notice is triggered by evidence of the possibility of fraud, not full exposition of the scam itself. . . . The plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing." *Greenburg*, *supra* at 682 (citations omitted). Otherwise stated, "The plaintiff need not have before him all the facts necessary to establish that a statement was untrue or omitted before the limitations period accrues. Once a plaintiff is in possession of facts sufficient to make him suspicious, or that ought to make him suspicious, he is deemed to be on inquiry notice." *Id*. at 682-683, quoting *Harner v Prudential Securities, Inc*, 785 F Supp 626, 633 (ED Mich, 1992).

In their complaint, plaintiffs asserted that they were entitled to damages because they had lost their investments made in Agave. Plaintiffs admittedly were not merely investors in Agave, but also were preexisting clients of Hyman Lippitt at the time of investment, or in the case of plaintiff Buchard, had personal contact with representatives of Hyman Lippitt before investing in Agave. Indeed, plaintiffs specifically alleged that, prior to any dealings with Hyman Lippitt over Agave, Hyman Lippitt engaged in estate planning and offshore asset protection, which included the formation of Seaspray and its financial structure. This establishes that plaintiffs knew that Hyman Lippitt had expertise in forming offshore investment ventures. After Hyman Lippitt established Seaspray for plaintiff Pukke, plaintiffs alleged that plaintiff Buchard and other Seaspray representatives traveled to Michigan for an investment meeting where Givens informed them that Hyman Lippitt represented Kisor, that it had done "due diligence" on Kisor, that Kisor's operation was legitimate, and that the returns on the investments in Agave were as represented. Plaintiffs asserted that they invested in Agave "[i]n reliance on these representations, [and] in the belief that Hyman Lippitt had properly, competently and ethically represented Agave *in its formation* and issuance of shares . . . ." (Emphasis added.) These statements indicate that plaintiffs, who were already experienced with Hyman Lippitt's offshore practice, knew at the time they invested in Agave that Hyman Lippitt represented Agave and the individual responsible for the investment entity, that Hyman Lippitt formed Agave and that it issued shares in Agave.

In November 2002, the SEC issued its press release. While the press release, including the SEC's complaint, did not refer directly to Givens or Hyman Lippitt, it contained allegations of fraud against Mohn and Kisor for their conduct relating to Agave. Specifically, the complaint alleged that Kisor misappropriated and misallocated investor funds, resulting in financial losses for investors.

Addressing a similar issue in the federal securities fraud cases, Judge Duggan concluded that the SEC's filing of its complaint and issuance of its press release in November 2002 should not have placed plaintiffs on inquiry notice of a possible cause of action against defendants.

*Adams*, *supra* at 12. While the press release alone may have been insufficient to apprise plaintiffs of a possible cause of action against defendants, plaintiffs' prior dealings with defendants and knowledge of defendants' involvement with Agave demonstrate that they knew or should have known of a possible cause of action in November 2002. Here, unlike in *Adams*, plaintiffs were clients of Hyman Lippitt or had personal contact with representatives of Hyman Lippitt. Plaintiffs indicated that they knew Hyman Lippitt had experience in forming offshore investment ventures and had "represented Agave in its formation and issuance of shares." Plaintiffs asserted that they invested in Agave in reliance on information about Kisor and his operation that was furnished by Givens and Mohn. Based on this knowledge, the press release naming Mohn and Kisor as defendants in a fraud scheme regarding the sale of Agave shares ought to have minimally made plaintiffs suspicious and to have spurred their diligent investigation of defendants' involvement in the scheme.[8] As noted, "[t]he plaintiff need only possess a low level of awareness; he need not fully learn of the alleged wrongdoing." *Greenburg*, *supra* at 682 (citations omitted).

Furthermore, contrary to plaintiffs' argument, the surfacing of the power of attorney document in December 2004 did not provide initial notice, but rather provided further confirmation of defendants' possible wrongdoing. Given their prior knowledge, once plaintiffs learned of the allegations against Mohn and Kisor in the SEC's complaint, this claim began to accrue because they were aware of a possible cause of action against defendants. Therefore, we conclude that the trial court did not err in dismissing as a matter of law the remainder of plaintiffs' claim under MCL 451.810(a)(2).

B. Legal Malpractice Claim

Plaintiffs also assert that the trial court erred in dismissing their legal malpractice claim against defendants as untimely. The elements of a legal malpractice claim are: "(1) the existence of an attorney-client relationship; (2) negligence in the legal representation of the plaintiff; (3) that the negligence was the proximate cause of an injury; and (4) the fact and extent of the injury alleged." *Manzo v Petrella and Petrella & Assoc, P.C.*, 261 Mich App 705, 712; 683 NW2d 699 (2004), citing *Charles Reinhart Co v Winiemko*, 444 Mich 579, 585-586; 513 NW2d 773 (1994). Plaintiffs alleged that defendants committed malpractice in the following manner:

> 54. Defendants Givens and Hyman Lippitt represented and held out to the public that they were equipped, qualified and prepared to represent Plaintiffs Pukke and Seaspray in matters relating to offshore investments generally, and specifically with respect to Agave.
>
> 55. At all times relevant hereto, Defendants had a duty to provide Plaintiffs with a qualified and competent attorneys and staff and to render competent advise,

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[8] Apparently, further investigation would have revealed references to Givens and Hyman Lippitt in the transcripts of Mohn's testimony attached to the Barrett Declaration that was referenced in the SEC's complaint.

representation and assistance in accordance with the standards then prevailing in the community. Defendant and each of the attorneys providing services to Plaintiffs had the duty to possess that degree of learning and skill that is ordinarily possessed by attorneys practicing in the areas in which Hyman Lippitt represented that it practiced, including in particular the fields of international or offshore tax planning and investment and state, federal and international securities law.

56. Defendants, at variance with applicable community standards, were guilty of malpractice and negligence, in that Defendants, knowing that potential investors, including Hyman Lippitt clients such as Plaintiffs would rely upon them to have competently performed services in accordance with their own representations:

(i) failed to perform any "due diligence" or background information on Kisor;

(ii) prepared and authorized the dissemination of subscription documents, including those sent to Plaintiffs, which misrepresented and omitted material facts;

(iii) supervised and administered a distribution of securities which violated both federal and Michigan law; and

(iv) prepared and advised the use of a general power of attorney which gave Kisor the power to misappropriate and/or misallocate Agave funds; and

(v) met with and personally assured Pukke and Buchard that Agave was a client of Hyman Lippitt and was an appropriate investment for Seaspray.

57. As alleged above, Hyman Lippitt fraudulently concealed the fact that the power of attorney which it had prepared and directed GNT to execute and forward to EDF Mann was fatally defective and had in fact permitted Kisor's embezzlement and misallocation of funds . . . .

With regard to the timeliness of this claim, the statute of limitations for a legal malpractice claim has two different measurements. A claim must be filed within two years after the attorney "discontinues serving the plaintiff in a professional or pseudoprofessional capacity as to the matters out of which the claim for malpractice arose." MCL 600.5805(6) and 600.5838(1). Alternatively, the claim must be filed within six months after the plaintiff "discovers or should have discovered the existence of the claim." MCL 600.5838(2).

Plaintiffs filed their initial complaint on February 1, 2005. Plaintiffs assert that Givens left Hyman Lippitt in June 2002. Therefore, plaintiffs' complaint was filed more than two years after Givens ceased providing legal services to them.

However, plaintiffs again assert that they did not discover the facts forming the basis of the legal malpractice claim until December 2004. In accordance with our previous holding, i.e., that the SEC's complaint and press release, when viewed in light of plaintiffs' prior dealings with defendants and knowledge of defendants' involvement with Agave, demonstrated that they knew or should have known of a possible cause of action against defendants in November 2002, we conclude that plaintiffs' legal malpractice claim was also untimely filed.

### C. Fraud and Breach of Fiduciary Duty Claims

Plaintiffs contend that their fraud and breach of fiduciary duty claims do not fail as being merely duplicative of their legal malpractice claim. Defendants argue otherwise, citing *Adkins v Annapolis Hosp*, 116 Mich App 558; 323 NW2d 482 (1982), *Barnard v Dilley*, 134 Mich App 375; 350 NW2d 887 (1984), and *Aldred v O'Hara-Bruce*, 184 Mich App 488; 458 NW2d 671 (1990). These cases do not stand for the proposition that claims arising out of an attorney-client relationship can only sound in negligence. Rather, they provide that the applicable period of limitations depends on the theory actually pleaded where the same set of facts support either of two different causes of action. See *Adkins*, *supra* at 563; *Barnard*, *supra* at 378; *Aldred*, *supra* at 490.

Furthermore, this Court has held that "the interest involved in a claim for damages arising out of a fraudulent misrepresentation differs from the interest involved in a case alleging that a professional breached the applicable standard of care. Simply put, fraud is distinct from malpractice." *Brownell v Garber*, 199 Mich App 519, 532; 503 NW2d 81 (1993). The elements of fraud are:

> "(1) That defendant made a material representation; (2) that it was false; (3) that when he made it he knew that it was false, or made it recklessly, without any knowledge of its truth and as a positive assertion; (4) that he made it with the intention that it should be acted upon by plaintiff; (5) that plaintiff acted in reliance upon it; and (6) that he thereby suffered injury. Each of these facts must be proved with a reasonable degree of certainty, and all of them must be found to exist; the absence of any one of them is fatal to a recovery." [*Brownell*, *supra* at 533, quoting *Scott v Harper Recreation, Inc*, 192 Mich App 137, 144; 480 NW2d 270 (1991), reversed on other grounds 444 Mich 441, 506 NW2d 857 (1993).]

"Silent fraud" exists when there has been a suppression of material facts and a duty to disclose those facts. *M&D, Inc v W. B. McConkey*, 231 Mich App 22, 35-36; 585 NW2d 33 (1998).

In accordance with the allegations of material misrepresentations and omissions plaintiffs asserted in the facts section of their complaint, they also allege:

> Givens was present when representations [were] made to representatives of [Seaspray], who had traveled to Michigan specifically to receive assurances from Mohn and Hyman Lippitt concerning Seaspray's proposed investment in Agave, that Agave was experiencing returns in excess of 2% per month. Givens failed to disclose that (i) Hyman Lippitt, contrary to written representations made to plaintiffs, had not done any due diligence on Kisor; and (ii) the represented returns were based solely upon information supplied [by] Kisor which was totally unverified.

> Hyman Lippitt failed to disclose that the power of attorney which it had prepared and which Givens had directed Puai Wichman to execute was defective and created a risk that Kisor could embezzle and/or misappropriate funds.
>
> Hyman Lippitt also knowingly and deliberately failed to disclose material facts to Seaspray by failing to disclose that it could not independently advise Seaspray concerning the proposed investment in Agave because of the multiple conflicts of [interest] which arose from its simultaneous representation of Kisor, Agave, Mohn and Seaspray, and by failing to disclose how those conflicts of interest could adversely affect plaintiff's interests in the future.
>
> In purchasing Agave Shares, Seaspray relied on the misrepresentations of material fact alleged above, and would not have made such purchase had it known the true facts, including the facts which defendants failed to disclose.

Because plaintiffs' complaint states a claim for fraud, and because fraud can be alleged independent of a legal malpractice claim, the trial court improperly dismissed plaintiffs' claim of fraud as duplicative of the legal malpractice claim under MCR 2.116(C)(8).

Similarly, this Court has held that breach of fiduciary duty claims are not duplicative of legal malpractice claims:

> The conduct required to constitute a breach of fiduciary duty requires a more culpable state of mind than the negligence required for malpractice. Damages may be obtained for a breach of fiduciary duty when a position of influence has been acquired and abused, or when confidence has been reposed and betrayed. [*Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Inst*, 266 Mich App 39, 47; 698 NW2d 900 (2005) (citation omitted).]

Plaintiffs alleged that, because of the attorney-client relationship with Hyman Lippitt, the law firm owed a fiduciary duty. Plaintiffs further alleged that Hyman Lippitt breached that duty by making material misrepresentations and omissions, and "particularly by advising and directing the creation of Genesis for the benefit of U.S. Investors and transferring all of Agave cash to Genesis." Thus, plaintiffs alleged a claim of breach of fiduciary duty. Accordingly, the trial court improperly dismissed plaintiffs' claim for breach of fiduciary duty as duplicative of the legal malpractice claim under MCR 2.116(C)(8).

### D. Section 810(b)

The first and second counts of plaintiffs' complaint allege claims against Givens and Hyman Lippitt under MCL 451.810(b). Under this section a person having one of the enumerated relationships with the seller of the securities may be held "liable jointly and severally with and to the same extent as the seller." *Id.* Defendants contend on cross-appeal that the actual seller of the securities must be a party to the action for plaintiffs to pursue claims based on section 810(b), relying on *Metal Tech Corp v Metal Teckniques Co, Inc,* 74 Ore App 297, 305-306; 703 P2d 237 (1985).[9] However, the holding in *Metal Tech Corp*, does not require the plaintiff to sue the actual seller. Rather, it merely requires the plaintiff to prove the liability of the seller. In *South Western Okalahoma Development Authority v Sullivan Engine Works, Inc*, 1996 OK 9; 910 P2d 1052 (1996), on which the trial court relied in rejecting defendants' argument, the Oklahoma Supreme Court held that, under a similar statute, the plaintiff was not required to sue the seller. *Id*. at 1058. "The plaintiff need only prove that seller has committed the acts or omissions which may result in liability according to subsection (a) . . . . As long as the requirements of [subsection b] . . . are proven, a plaintiff may bring an action against the material participant only or against the seller as well." *Id*. Therefore, the trial court did not err in denying defendants' motion for summary disposition on this basis.

Also on cross-appeal, defendant Hyman Lippitt claims that it is not a member of a class that can be sued under section 810(b). Plaintiffs' complaint alleges:

> By virtue of § 451.810, Plaintiff is entitled to recover the entire consideration paid for the Agave Shares. Defendants Givens and Hyman Lippitt are liable for the aforesaid violations by virtue of Section 451.810(b), which provides that every person who directly or indirectly controls a seller [is] liable under Section 451.810, and every agent of the seller who materially aids in the sale, is also liable jointly and severally with the seller. Because Givens acted as alleged above within the course and scope of his employment with Hyman Lippitt, Givens and Hyman Lippitt were "control persons" of Agave. In addition, by acting as alleged above, Givens acted as an agent of the seller and materially aided in the sale of Agave Shares to Plaintiffs. Hyman Lippitt is vicariously liable for the acts and omissions to act of Givens, because Givens at all times acted, or failed to act, within the course and scope of his employment by Hyman Lippitt.

MCL 451.810(b) imposes liability on a "person" having one of the specified relationships with the seller of the securities. A person has been defined, in relevant part, as "an individual, a corporation, a partnership, [and] an association . . . ." MCL 451.801(s). It is a well-established legal principle that a corporation may be liable for the acts of its employees committed within the course and scope of the employment. *Linebaugh v Sheraton Michigan Corp*, 198 Mich App 335, 343; 497 NW2d 585 (1993). Because a corporation acts through its employees, Hyman Lippitt could only be held liable for its involvement if Givens acted within the course and scope of his employment for the firm. Plaintiffs' complaint asserts that Givens did so. Therefore, we conclude that the complaint sufficiently alleges that Hyman Lippitt is liable as a controlling person under MCL 451.810(b). We further conclude that plaintiffs' reference to the common law theory of "vicarious liability" was in regard to the principal-agent relationship between Hyman Lippitt and Givens, which was necessary to prove Hyman Lippitt's liability. Plaintiffs were not using a common law theory to create a new class of persons against whom liability may

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[9] We note that defendants did not claim that they were not material participants in the sale of Agave shares.

be asserted as defendants suggest. In sum, the trial court did not err in denying defendants' motion for summary disposition on the basis of this argument.

E. Judicial Disqualification

Plaintiffs contend that the trial judge should have been disqualified. When reviewing a motion to disqualify a judge, we review the trial court's factual findings for an abuse of discretion, but review de novo the applicability of the facts to the relevant law. *Gates v Gates*, 256 Mich App 420, 439; 664 NW2d 231 (2003). Following the judge's disclosure that J. Leonard Hyman had represented her father's business at one time, plaintiffs filed a motion to disqualify Judge Tyner pursuant to MCR 2.003. Ruling from the bench, the trial judge denied the motion, finding that:

> There's absolutely no reason for me not to hear this case. I certainly was surprised, at the very least, to see that the Hyman Lippitt firm represented Hartman and Tyner as long ago as of '92 I believe it is. Anyway, enough said on this matter.

A party seeking disqualification of a judge based on bias or prejudice bears the burden of proof and must overcome a strong presumption of judicial impartiality. MCR 2.003(B); *Cain v Dep't of Corrections*, 451 Mich 470, 497; 548 NW2d 210 (1996). Absent proof of actual personal bias or prejudice, a judge will not normally be disqualified. *Schellenberg v Rochester Lodge No 2225 of the Benevolent & Protective Order of Elks*, 228 Mich App 20, 39; 577 NW2d 163 (1998). Generally, such a showing requires that the bias be both personal and extrajudicial, in other words "the challenged bias must have its origin in events or sources of information gleaned outside the judicial proceeding." *Cain*, *supra* at 495-496. Moreover, judicial disqualification based on due process is "not easily met" and, absent a showing of actual bias, is justified only where "'experience teaches that the probability of actual bias . . . is too high to be constitutionally tolerable.'" *Id.* at 514, quoting *Crampton v Dep't of State*, 395 Mich 347, 351; 235 NW2d 352 (1975).

In this case, plaintiffs based their allegation of bias on the prior business relationship that the trial judge's father had with Hyman. There was evidence that a prior business relationship existed; however, there was also evidence that the relationship occurred several years before and that Hyman was not involved in any of the allegedly fraudulent transactions at issue in this case.[10] Plaintiffs have pointed to no conduct by Judge Tyner that demonstrates prejudice or bias, other than that Judge Tyner ruled against them on disputed matters. Rulings against a party, even if erroneous, do not constitute bias or prejudice and are not grounds for disqualification. *Armstrong v Ypsilanti Twp*, 248 Mich App 573, 597-598; 640 NW2d 321 (2001). Additionally, there is no record evidence for believing that Judge Tyner displayed "a deep-seated favoritism or antagonism that would make fair judgment impossible." *Cain*, *supra* at 496 (citation omitted).

[10] Although Hyman claims that he has no knowledge concerning this case, his signature appears on Hyman Lippitt's motion for summary disposition. Nevertheless, there is no record evidence that Hyman argued the motion or appeared before the trial judge in this matter.

Even plaintiffs' assertions that Judge Tyner failed to enter an order denying their motion and to seek referral to the Chief Judge do not demonstrate bias. Apparently, plaintiffs initially failed to present an order to the court, and Judge Tyner eventually entered a written order in accordance with her prior decision on the matter. Furthermore, "[i]n a court having two or more judges, *on the request of a party*, the challenged judge shall refer the motion to the chief judge, who shall decide the motion de novo." MCR 2.003(C)(3) (emphasis added). Plaintiffs did not make such a request until August 17, 2005, after which Chief Judge Potts heard the matter and determined that there was no need for disqualification. Based on the record, plaintiffs failed to show actual and personal bias or anything close to satisfying the constitutional standard. Therefore, the trial judge should not have been disqualified.

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Peter D. O'Connell
/s/ Christopher M. Murray